

[2022] PBRA 154

Application for Reconsideration by Johnson

Application

1. This is an application by Johnson (the Applicant) for reconsideration of a decision of an oral hearing dated 3 September 2022. The oral hearing was on 20 July 2022. The outcome of the decision was no decision to release and no recommendation for transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the Application, the decision letter and the dossier. Some of the documents taken into account by the panel and available to the parties and witnesses at the hearing were not in the dossier, and I asked for them to be sent to me separately. I also asked for copies of emails between the Case Manager and the Applicant's legal representatives as they are cited in the Application. I finally asked for confirmation as to when the decision was sent to the Case Manager.

Background

4. The Applicant is serving a life sentence for murder and child cruelty. The victim was a minor. Aged 25 at the time of sentence, he was given a minimum tariff of 22 years and 317 days. This tariff expired on 24 October 2019. The Applicant was released on licence on 20 October 2020 and recalled to custody on 17 July 2021. This is his first recall, and this review is the first review of that recall. He was 49 years old at the time of the hearing.

Request for Reconsideration

5. The application for reconsideration is dated 30 September 2022.
6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints, and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.




3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk

 [Parole_Board](https://twitter.com/Parole_Board)

 0203 880 0885

7. The grounds for seeking a reconsideration are as follows:

a) Procedurally unfair:

The Applicant states that a gap of almost eight weeks from the evidence being taken and the decision being finalised introduces an inevitable level of unreliability into the decision which makes the decision procedurally unfair. The Application also states that from the decision letter it is clear that the Chair's audio recording of the hearing had failed part way through the hearing, and she would have relied on her chair's notes. This added to the uncertainty given the passage of time between hearing and decision.

b) Irrationality:

The Applicant states that if it is found that the panel erred under the first ground then it follows that it did not follow the law and that therefore the decision must also be irrational.

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board on 12 August 2021. On 17 September 2021 a Member Case Assessment was undertaken and the panel member directed that the case be heard at an oral hearing. The case was listed for 22 February 2022. The panel convened to hear the case on the day however the hearing was adjourned for a number of reasons, including the undertaking of a psychological risk assessment, and the case was re-listed on 20 July 2022. This hearing was largely effective, however the panel chair adjourned the hearing on the day for further clarification of evidence taken on the day. The panel chair directions give deadlines for the further reports and the adjournment review date was given as 1 August 2022, following which the case would be concluded on the papers.

9. The panel of three consisted of two independent members and a psychologist member. The hearing was on 3 September 2022 by way of video link. The panel reviewed a dossier of 1,075 pages, and I have detailed above under paragraph 3 that there were documents not added to the dossier but available for the panel, parties and witnesses to download separately. Evidence was taken from the Prison and Community Offender Managers, a prison psychologist and a witness from the police service.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 3 September 2022 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

11. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

12. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

15. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

16. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.
17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

18. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
19. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

- (a) express procedures laid down by law were not followed in the making of the relevant decision;
- (b) they were not given a fair hearing;
- (c) they were not properly informed of the case against them;
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

20. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Secretary of State

21. On 17 October 2022 the Secretary of State informed the Parole Board that they had no representations to make on this Application.

Discussion

22. I have before me the following facts:

- The oral hearing was on 20 July 2022 and was largely effective, all witnesses including the Applicant having given evidence.
- On 21 July 2022 the panel chair sent out an adjournment notice. This explained that the panel needed some further information before a decision could be made. The adjournment notice directed this further information. Deadlines were given for these reports/documents.
- The adjournment notice stated that the panel, on receipt of the directed further material, would review the case on 1 August 2022. The decision would have been due 14 days after this review date.
- There are chasing emails from the case manager and other officers of the Secretariat to the chair, and emails from the Applicant's legal representatives to the Case Manager asking for the decision and asking for reasons for the delay. The first email to the Chair from the Case Manager that I have seen is dated 17 August 2022. The panel chair did respond to emails, indicating that she was working on the decision.
- As the delay became longer, the Applicant's legal representative made it clear that the Applicant was getting very anxious.
- The decision letter is dated 3 September 2022, however the Case Manager received it on 12 September 2022.
- The Applicant's legal representatives state they received it on 13 September 2022.

23. Rule 25 of the Parole Board Rules 2019 as amended (the Rules) provides that where a panel makes a decision following an oral hearing, they must provide the written decision to the parties within 14 days of the hearing. The Application quotes earlier guidance about getting the decision to the parties on time as a matter relating to the Code of Conduct for Members of the Parole Board.

24. Rule 6(11) of the Rules give panel chairs the power to adjourn or defer proceedings for further information. Therefore there is no issue that the panel had the power to adjourn in this case.

25. The difficulty arises with the failure of the panel to provide a decision within 14 days of the review date. The adjournment notice states that the review would be on 1 August 2022. 14 working days from the 1 August 2022 would make the decision due on 18 August 2022. It appears that the decision, although dated 3 September, was not sent to the Case Manager for sending to parties till 12 September.
26. It is often the case that, following an adjournment, the adjournment review date is not effective, usually because the reports directed have not been provided in time, leaving the panel chair and case manager to chase the production of the reports. More unusually, panels can find themselves behind in their deadlines due to personal circumstances of one or more member or sudden increase in workload that makes it difficult for the panel to finalise the decision.
27. When it is clear that the decision will not be ready in time for the due date, the panel chair should provide a further adjournment notice, with explanation as to why a new review date is given. This would enable the prisoner who is no doubt anxiously waiting for the decision, to have some certainty as to when they might receive the letter. This did not happen in the Applicant's case.
28. I accept under the circumstances that, because of the significant delay in sending the decision on time and the failure to provide a further adjournment in order to manage the expectations of the Applicant, that the ground for procedural impropriety is met.
29. For the avoidance of doubt, I do not accept the contention made by the Application that there was bias as a result of the delay and because of the lack of audio recording. There would need to be something other than procedural lateness to indicate bias and this has not in my view been made out by the Application. I also cannot see how a delay in itself can lead to a perception of bias. I do accept that the Applicant would have been anxiously awaiting the decision and it is evident from the chain of emails that the Applicant's solicitors were receiving frequent calls from him asking him for the decision. I find procedural unfairness with respect to paragraph 20(a) above alone – express procedures laid down in law were not followed.
30. The Application also suggests rather briefly that if I find that there was procedural irregularity the decision must also be irrational. Again, I do not accept that if a decision process has a procedural flaw it is automatically irrational. Other than its lateness, the decision letter appears to be fully explained and logical.

Decision

31. Granted – Accordingly, whilst I do not find that the ground for irrationality is made out, I do consider, applying the test as defined in case law, that the decision dated 3 September 2022 to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Chitra Karve
31 October 2022

 3rd Floor, 10 South Colonnade, London E14 4PU

 www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk

 Parole_Board

 0203 880 0885